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No. 89-964

In The

Supreme Court of the United States

October Term, 1989

RAYMOND J. MOSKAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Upon review of the arguments advanced by the United States in its Brief, petitioner asks the Court to consider the following issues in response:

NEITHER THE LANGUAGE NOR PURPOSE OF SECTION 2314 INDICATE THAT IT APPLIES TO ALL DOCUMENTS WHICH CONTAIN INCORRECT INFORMATION

In an attempt to save Section 2314, the United States asserts that it was intended to cover all documents with

incorrect information, no matter how that information found its way into the document. Petitioner believes that this interpretation stretches the statute past the breaking point.

The United States suggests that there are two reasons why the term "falsely made" in the statute applies to the Virginia titles in this case. The first reason advanced by the government is that the term cannot be the equivalent of forged since it must have an "independent meaning." (Brief at 9)

Such a position assumes that the petitioner is correct in his initial assertion that the Virginia titles are neither forged, counterfeited nor altered within the meaning of the statute and that their only possible inclusion is within the "falsely made" language of the statute.[1]

While petitioner continues to believe (and the United States does not appear to challenge this belief) that most courts have found that the concepts of forgery and falsely made are synonymous under the common law,[2] even if this Court were to require an "independent meaning" as the United States suggests, such a conclusion would not

[1] Petitioner would note in passing that the terms counterfeiting and alteration are also viewed in the context of forgery and their definition often depends on the interchangeable use of these same words. *United States v. Tucker*, 473 F.2d 1290, 1293 (6th Cir.), *cert. denied*, 412 U.S. 942 (1973).

[2] For an additional view of the common law relationship between forgery and "false making" see Note, 72 Harv.L.Rev. 566-568 (1959).

be fatal to the petitioner's challenge. If, as the government urges, an independent meaning must be supplied – despite the admitted legislative silence on the question – such a meaning can be formulated which would *not* cover petitioner's activities yet still be in compliance with what the government perceives as the goal of the legislation.

Although the petitioner is much more comfortable in a criminal context to urge reliance upon past definitions of "falsely made" as the equivalent of forgery, if required by the government's proposition, petitioner is able to fashion several scenarios of criminal conduct in which "falsely made" is not exactly synonymous with forgery, yet does not include the conduct for which he was convicted under Section 2314.[3] Thus, "falsely made" would have the "independent meaning" sought after by the United States, yet would still not prohibit the conduct of the petitioner.

Of course, such a set of circumstances should alert even the government to the probability that their interpretation of the meaning of the statute cannot pass muster under various vagueness and notice tests long established by this Court. *McBoyle v. United States*, 283 U.S. 25 (1931); *See also, Dunn v. United States*, 442 U.S. 100, 112 (1979); *Huddleston v. United States*, 415 U.S. 814, 831

[3] Such scenarios might include one in which titles are obtained by bribery of the issuing authority or by the production of titles by the fraudulent manipulation of title generating equipment. Such titles would be considered "falsely made" under a plain meaning of the words yet not necessarily be forged, altered or counterfeit.

(1974); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Bell (Robert) v. United States*, 349 U.S. 81, 83 (1955).

Perhaps it was because of the problem of formulating a new definition that the United States asserts in its brief that the "independent meaning" theory *requires* the term to apply to "falsity effected by the insertion of false information in the process leading to the creation of a genuine document." (Brief at p. 9) Why the term in question *must* mean exactly this phrase remains a mystery.[4] Although the definition supplied would admittedly cover the challenged conduct, petitioner suggests that this is the only reason why the government has so defined the phrase.[5] Mindful of the Court's recent decision in *Taylor v.*

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[4] In some measure, the proposed definition rests upon Court of Appeals decisions that considered the interstate transportation of bogus financial instruments. See cases cited at page 9 of Brief of United States. All of these cases but one dealt with financial instruments – checks, drafts or certificates of deposit in which the invalidity of the information made the genuine paper worthless. The *only* case that considered automobile titles, *United States v. Daly*, 716 F.2d 1499 (9th Cir. 1983), *cert. dismissed* 465 U.S. 1075 (1984), dealt exclusively with stolen vehicles and titles that reflected fraudulent information on ownership and identity of the vehicle. The introduction of false information that makes a title invalid proof of ownership may well be one that is falsely made. Such is not the case in the present matter.

[5] Moreover, the proposed government definition would reach conduct which is not normally recognized as Federal criminal violations, i.e. inducing changes in the title sections for such items as horsepower, engine displacement, fuel used or vehicle weight (which may affect taxes) or description of vehicle (which may affect insurance rates). In addition, in the event of a title issuing authority mistake (a not unheard of

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United States, ___ U.S. ___, 110 S.Ct. 2143, 109 L.Ed.2d 607 (May 29, 1990), petitioner has searched in vain for the source of the government's proposed 'generic' definition.

Certainly legislative history does not support the proposed definition. The Courts of Appeals have split on this question and those courts whose rulings favor the government's proposal admit that it is an expansion over the traditional view. To advance it as the "better rule" simply because it will catch more people in criminal conduct is a remarkable display of insensitivity to the application of the criminal code.

THE LEGISLATIVE HISTORY DOES NOT INDICATE THAT THIS STATUTE APPLIES TO ALL DOCUMENTS WHICH CONTAIN INCORRECT INFORMATION

Recognizing that prior judicial decisions do not support the position to broaden the criminal coverage of Section 2314, the United States advances as its second reason for affirmance the notion that the petitioner's conduct is what the "falsely made" language was really intended to cover when the words were first engrafted into the statute in 1939. (Brief at 11) Petitioner suggests that nothing could be further from reality.

Admitting that the legislative history of the 1939 addition is "scanty," the United States, nevertheless, argues that the main purposes of the amendment are

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occurrence) the government proposal would appear to place an obligation – under penalty of ten years imprisonment – on the title holder to correct a DMV mistake. Surely, neither of these possibilities was intended by the statute.

clear. Yet the very argument the government advances doubles back upon itself upon examination since even the government admits that the reason for the 1939 amendment was the concern over counterfeited securities. If the argument of the United States is advanced to its eventual conclusion, the addition of the "falsely made" language should be made to apply in the context of an expansion upon counterfeiting activities – a genus of fraud in which the present petitioner was never involved.

It is significant to note that not even the government suggests that the 1939 amendment had anything at all to do with odometer rollback schemes. While there were no doubt title irregularities from the first day that automobile titles were required, there is no evidence that the inclusion of "falsely made" into the statute is even remotely connected to any perceived need for Federal law enforcement in title laundering operations.

To argue as the United States does in its brief that the strict construction of Section 2314 would be inconsistent with the broad anti-fraud purposes of the statute (Brief at 13) would be to manufacture a background for the 1939 amendment out of nothing but wishful thinking and would wink at the age old requirements for the interpretation of the criminal code.

While the United States attempts to put the question in the rather prejudicial light of declaring the incongruity of petitioner's argument with the purpose of the statute, the ultimate extension of the government's argument would eliminate the need for any statutory interpretation of criminal law since it would require the criminal code to contain but a single restriction: "Don't do anything

wrong that may later move in interstate commerce." Construction would be limited to the simple question of whether the legislature would have called the conduct wrong if it knew about it at the time of enactment. Such simplicity may win the war on crime but make losers of us all.

THE UNITED STATES IS INCORRECT IN ASSERTING THAT THE CONGRESS EVIDENTLY DID NOT ADOPT THE COMMON LAW WHEN IT INSERTED THE WORDS "FALSELY MADE" INTO THE STATUTE

It is clear that the United States recognizes that it faces an up-hill battle to convince this Court that Congress did not mean what everyone (or nearly everyone) thought "falsely made" meant when it inserted that language into the 1939 amendment. (Brief at 14) Undaunted by the task, however, the government suggests several reasons why Congress knew what it was doing before anyone else apparently did.

At the outset, there are several principles upon which the petitioner and the United States agree: We agree on the presumption that Congress intended the common law meaning of the terms it uses absent any contrary indications. *Bell (Nelson) v. United States*, 462 U.S. 356, 360 (1983); *Morissette v. United States*, 342 U.S. 246, 263 (1952). We agree that there is nothing in the language of Section 2314 to indicate a departure from the common law. We also agree that there is nothing in the legislative history of Section 2314 to indicate a departure from the presumption.

While it is true, as the United States argues, that this Court has, at times, departed from common law definitions, those departures have always been based on the intention of Congress and not the whim of a prosecutor. Petitioner suggests that the currently accepted meaning of the term "falsely made" is neither arcane or artificial, nor is it obsolete or inconsistent with the purpose of the statute.[6] Thus, the suggestion that a more "contemporary" meaning of the phrase is appropriate should be rejected by this Court.

Implicit in the position of the United States is the recognition that the common law analysis of the phrase "falsely made" would not include the petitioner's challenged conduct. While this implication is used to powerful effect throughout the brief to imply that a clever scheme which discovered a loophole in Section 2314 should not go unpunished, the inference misses one of the most basic parts of the petitioner's challenge – the government never elected to charge him with the interstate transportation of the admittedly altered titles *into* Virginia. The prosecutorial reason why the indictment alleged as offenses only the valid titles from Virginia remains unknown. The petitioner wishes to re-emphasize that it was not he who took advantage of a perceived

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[6] While the brief of the United States seeks to emphasize the extended age of a number of the cases relied upon in the false making area, Petitioner views this as more of an asset than a liability since these decisions now represent well recognized principles. While the questions they settled are no longer as frequently raised, their guidance has not diminished with age. *See, e.g. State v. Schoelerman*, 315 N.W.2d 67 (Sup.Ct. Iowa, 1982).

lapse in the statute but the prosecuting authority who made the decision to phrase the indictment in such a way that this appeal was required. Thus, the government's central argument that to give "falsely made" a restrictive meaning would defeat the purpose of the statute is not true. The government could have used the restrictive meaning on the altered titles sent from Pennsylvania. Petitioner submits that this was the activity which Congress intended to prevent. *See, e.g. United States v. Cotoia*, 785 F.2d 497 (4th Cir. 1986).

The United States correctly observes that there is nothing in the Act itself that even implies that Congress intended to broaden the scope of Section 2314 to make "falsely made" a term which expanded upon the common law. Because of that legislative fact, the government draws guidance for its proposition of broad interpretation from two other sources.

The first is an analysis for the history of *United States v. Davis*, 231 U.S. 183 (1913) and the re-codification of 18 U.S.C. 73 in 1948. Because the terms "falsely made" were included in both the *Davis* decision and the recodification, the United States suggests that because of the addition of a word in the re-codification that Congress rejected the narrow common law definition and intended Section 73 to cover documents which are both false in content and false in execution. (Brief at p. 18) The United States then makes the rather extraordinary leap of logic that Congress must also have rejected the accepted meaning of the phrase in the 1939 Amendments which inserted the language into Section 2314. Such a conclusion is more wishful thinking than historical fact. Moreover, the analogy which the government suggests, is far from a close

fit. The statute in question contained different language which supports the proposition of *Davis* on the one hand but does nothing to advance the argument of Congressional knowledge of Section 2314.

The ambiguity of the above example is recognized even by its proponent (Brief at 23) and is emphasized by the secondary argument advanced by the United States that the phrase "falsely made" should not be restricted because the 1984 amendment to Section 2311 defines securities in a certain fashion.[7] Petitioner is forced to admit that he is at somewhat of a loss to completely understand the logic of the government's argument in this area. It is true that the 1984 Act did include the "valid or blank motor vehicle title" language as a definition of a "security." While there is no dispute about the definition, how the United States can then conclude that Congress *must* have meant "falsely made" to include genuine documents with false information is a form of reasoning which petitioner simply does not understand.[8]

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[7] The brief of the United States sometimes leaves the impression that the Motor Vehicle Theft Law Enforcement Act of 1984, P.L 98-547, Title II, 98 Stat. 2770, amended both Section 2311 and 2314. This impression is not correct. The 1984 Act did not amend Section 2314 in any way.

[8] Moreover, petitioner also disagrees with several of the assumptions upon which the United States reaches its conclusion. Contrary to what the government contends, a motor vehicle title can be altered and remain valid. Moreover, irrespective of the "valid or blank" language, even the non-creative mind can fit motor vehicle titles into four or five other security descriptions contained in Section 2311.

In addition, the petitioner would note that the legislative hearings on the bill that eventually became the 1984 amendment described the securities definition section as directed at an existing problem of counterfeiting titles in connection with vehicle theft.[9] There is no mention of odometer rollback concerns in any of the hearings in the Motor Vehicle Theft Act.

The United States then attempts to bootstrap its position by referring to the legislative history of the 1984 Act. The government itself, however, recognizes that the 1984 Act was directed at theft – not odometer rollbacks. While it is true that automobile theft sometimes involves a form of title washing, it is critical to realize that such a scheme requires the alteration of ownership and identification data on titles – not odometer readings.

The possession of a genuinely issued title with a false VIN or owners name is an entirely different matter than the present case. Such a document is not valid as evidence of ownership for the vehicle in question. Because the false information goes to ownership which is the very essence of a title, the interstate transportation of such an invalid document is covered under Section 2314. It must clearly be understood that vehicle theft is a completely different problem than presented in petitioner's case. If the United States suggests that the 1984 Act is directed towards interstate car thefts, they are correct. However, if

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[9] Statement of Paul Gilliand, National Automobile Theft Bureau, House Hearing, 97-109, Motor Vehicle Theft Law Enforcement Act: Hearings on H.R. 4325 Before the House Comm. on Interstate and Foreign Commerce. 97th Cong. 2nd Sess. p. 80 (1982).

they are seen as suggesting that the 1984 Act was directed at the transportation of a valid title with an incorrect odometer reading, the government has missed the mark by a country mile.[10]

The argument of the United States in this area reveals another fatal flaw in their position. Assuming that the government has researched the earliest federal enforcement concern about odometer rollbacks to 1980 testimony (Brief at 24), to impute this concern to the 1939 amendments (as the United States does in the initial portion of its brief) is imaginative argument but unfortunately without basis.

Finally, petitioner would note that the United States proposal to broaden criminal coverage generates several public policy concerns. These issues were raised by the petitioner in his initial brief and the government has elected to not address the social policy reasons of why the

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[10] It is true that the United States is able to point to a single passing reference to odometer fraud in certain House testimony. (Brief at 24, n. 17) A review of that testimony reveals how little authority the reference lends to the government position. It is correct that Commissioner Claybrook did make a reference to odometer fraud in connection with titles. However the bill that she was testifying about did not have any relationship to Section 2314 and concluded that this was "another area of fraud," (p. 304) that Congress was presumably not concerned with at least in these hearings. Significantly, the Claybrook testimony is accompanied by a DOT manual entitled: "A Manual of Anti-Theft Guidelines for State Motor Vehicle Titling Programs" dated January 1980. The Manual recognizes the problem of state verification of title information (pp. 316-319) that leads to odometer fraud and recommends that the *states* undertake corrective action.

broader approach is less desirable. However, these concerns will not go away by ignoring them. Petitioner believes that they are additional factors that weigh against adopting the broader interpretation as the "better approach."

CONCLUSION

It is ironic that the interpretation of the meaning of this statute may be determined by cases decided even before the invention of the automobile. The principles of interpretation, however, remain intact because they are grounded on elemental fairness. That fairness is all that petitioner seeks.

The United States seeks to change the meaning of Section 2314 only because it would include more activity within the purview of the federal criminal code. Petitioner suggests that this is hardly a reason to call the expansion a "better rule." Recognizing that Courts should be loath to expand criminal coverage and that no such expansion was ever contemplated by the Congress for this statute, the Petitioner urges this Court to reverse the decision of the Third Circuit.

Respectfully submitted,

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